Filed 6/7/07 In re Jayla F. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re JAYLA F. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. B.F., Defendant and Appellant.	C054084 (Super. Ct. Nos. JD222826, JD222827)

B.F., mother of John, appeals from orders terminating her parental rights.[1] (Welf. & Inst. Code, §§ 366.26, 395.)[2]

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[1] Respondent has requested this court take additional evidence of matters occurring after the notice of appeal was filed. The request is denied.

Subsequently, respondent requested that this court take judicial notice of the juvenile court's order of April 10, 2007, dismissing the dependency as to Jayla F. because the minor has died. We shall grant this request for judicial notice and also dismiss the appeal as to Jayla F. as moot.

Further, respondent requested we take judicial notice of the juvenile court's order of April 19, 2007, correcting its prior *[Continued]*

Appellant contends the court erred in terminating her parental rights because she established the minor would benefit from continued contact with her, there was insufficient evidence to support the court's finding the minor was likely to be adopted and the requirements of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901, et seq., regarding notice were not met. We affirm.

FACTS

The two-year-old minor was removed from parental custody in August 2005 due to appellant's substance abuse, mental health problems and aggressive behavior.

At the detention hearing, appellant disclosed that the maternal great-grandmother may have Indian ancestry but the tribal affiliation was unknown. Notice of the proceedings was sent to the Bureau of Indian Affairs (BIA). The paralegal who sent the notice had only appellant's name because appellant did not return the ancestry questionnaire; however, the names of the maternal grandparents were known to the social worker. No subsequent notice was sent to the BIA with these additional names although the BIA informed the social worker further family information was needed to make a determination of the minor's status.

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findings to reflect that, based on paternity tests, John J.T.G. is not John's biological father. We shall grant this request for judicial notice. In all other respects respondent's request for judicial notice is denied.

2 Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

Appellant failed to reunify with the minor and the court set a section 366.26 hearing to select a permanent plan.

The report for the hearing stated that the three-year-old minor was healthy and developmentally on target. He had no emotional or behavioral issues. Appellant had been visiting regularly and interacted appropriately. While an adoptive placement had not yet been identified, the social worker believed he was likely to be adopted.

At the hearing in November 2006, appellant testified she was currently visiting regularly although she admitted she had not done so earlier in the dependency because she was depressed and off her medication. She stated the minor recognized her at visits, called her mom, was happy to be with her and cried at the end of visits. Appellant acknowledged that at first the minor had not wanted to talk to her but now visits made her feel "really good" and she wanted another chance to reunify. Appellant did not want the minor adopted.

Appellant argued the regular visits were evidence of benefit to the minor in continued contact with her. The court disagreed, stating there was not a sufficient relationship to justify an exception to adoption and also noted appellant continued to use drugs during her current pregnancy and long after the minor was removed from her care. The court found by clear and convincing evidence the minor was likely to be adopted and terminated appellant's parental rights.

DISCUSSION

I.

Appellant contends the court should have found she established an exception to the legislative preference for adoption because she visited regularly and the minor would benefit from continued contact with her.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*. [Citation.] [Citations.]' If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child. [Citation.]" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, original italics.) There are only limited circumstances which permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1).) The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; Cal. Rules of Court, rule 1463(e)(3); Evid. Code, § 500.)

One of the circumstances in which termination of parental rights would be detrimental to the minor is: "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

(§ 366.26, subd.(c)(1)(A).) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Beatrice M*. (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Teneka W*. (1995) 37 Cal.App.4th 721, 728-729; *In re Brian R*. (1991) 2 Cal.App.4th 904, 924.)

Appellant failed to meet her burden. The evidence showed recent regular visits which were pleasant and during which appellant interacted appropriately with the minor. However, there was no evidence of a significant positive emotional attachment which could outweigh the benefit to the minor of a secure stable permanent home. It was clear that appellant was attached to the minor, but the evidence did not demonstrate the minor had a reciprocal strong attachment to appellant. The juvenile court correctly concluded appellant did not establish

that termination of her parental rights would be detrimental to the minor.

II.

Appellant contends there was not clear and convincing evidence the minor was likely to be adopted.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence--that is, evidence which is reasonable, credible and of solid value--to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, *supra*, at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

"If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the

court to conclude that it is not likely the child will be adopted." (§ 366.26, subd. (c)(1).)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child. (*In re Sarah M*. (1994) 22 Cal.App.4th 1642, 1649.) The existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid*.; *In re Scott M*. (1993) 13 Cal.App.4th 839, 844.) "There must be convincing evidence of the likelihood that the adoption will take place within a reasonable time." (*In re Brian P*. (2002) 99 Cal.App.4th 616, 625.)

The only evidence before the juvenile court on this issue was the assessment prepared for the hearing. The assessment stated the minor was young, healthy and without developmental or behavioral problems. There was no reason that a home could not be found for the minor within a reasonable time and no one presented any evidence to the contrary. Substantial evidence supported the juvenile court's finding the minor was likely to be adopted.

III.

Appellant contends there was inadequate notice pursuant to the ICWA because information on the maternal ancestors known to the Department of Health and Human Services (DHHS) was not included in the notice sent to the BIA.[3]

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[3] Appellant also raises issues regarding notices based upon the fathers' claimed Indian heritage. However, as to Jayla, the issue is moot and as to John, the ICWA does not apply because his alleged father, through whom Indian heritage was claimed, was not *[Continued]*

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and DHHS have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.664(d).)

Notice is triggered only where the circumstances provide probable cause for the court to believe that the child is an Indian child, e.g., when a "person having an interest in the child" provides "information suggesting that the child is an Indian child[.]" (Cal. Rules of Court, rule 5.664(d)(4)(A).) "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" (25 U.S.C. 1903(4).)

The information provided to the court, i.e., that the maternal great-grandmother may have had Indian heritage in an unknown tribe, was too vague to suggest the minor was an Indian child. No one provided any further clarifying information and appellant did not return the ancestry information which might have added additional details. Accordingly, the notice

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his biological father. (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 708-709.)

requirement of the ICWA was not triggered. Any deficiencies in the notice which was gratuitously sent to the BIA are irrelevant.

DISPOSITION

The orders of the juvenile court as to John are affirmed. The appeal as to Jayla is dismissed as moot.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.